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MAJIDEE PARK AUTO SPARES & SERVICES SDN BHD & ANOR v. N THANAVATHY RAJAH & ANOR

COURT OF APPEAL, PUTRAJAYA
AHMAD ZAIDI IBRAHIM JCA
AZIZUL AZMI ADNAN JCA
B ALWI ABDUL WAHAB JCA
[CIVIL APPEAL NO: J-01(A)-408-07-2023]
29 APRIL 2025

C **Abstract** – *(i) When a court considers an application for the removal of a company liquidator, it will assess the interests of the general body of creditors and contributories as a whole. There is no requirement that each and every person who is interested in the liquidation must support the application for removal, for if this were so, then the liquidator who* D *has unfairly preferred the interests of one creditor or contributories over those of the general body of creditors and contributories can never be removed. It sufficed if the court is of the view that it would be in the interest of those who are interested in the liquidation for the liquidator to be removed; (ii) All contributories or creditors have to be given notice of the application for the removal of the liquidator. If the requirement for* E *prior notice is not fulfilled, it may be fatal to the application.*

F ***COMPANY LAW:*** *Liquidators – Removal – Application for – Whether liquidator had valid license and clothed with authority to act – Whether liquidator failed to perform duties with promptitude – Whether application to remove liquidator supported by contributories and creditors – Whether notice of application for removal given to all contributories and creditors – Requirement for prior notice – Whether fulfilled – Whether fatal to application – Companies Act 2016, s. 482(b)*

G ***COMPANY LAW:*** *Winding up – Removal of liquidators – Application for – Whether liquidator had valid license and clothed with authority to act – Whether liquidator failed to perform duties with promptitude – Whether application to remove liquidator supported by contributories and creditors – Whether notice of application for removal given to all contributories and creditors – Requirement for prior notice – Whether fulfilled – Whether fatal to application – Companies Act 2016, s. 482(b)*

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This appeal concerned the decision of the High Court in allowing the first respondent's application to remove the second appellant as a liquidator of the first appellant. The second appellant was appointed as the liquidator of the first appellant ('company') pursuant to a winding-up order. The first respondent was one of the directors of the company. As a result of the I removal of the second appellant as the liquidator of the company, the High

Court appointed the Director General of Insolvency ('second respondent') as the official receiver. In allowing the first respondent's application, the Judicial Commissioner ('JC') found that: (i) because the second appellant's liquidator's license had not been renewed, the removal of the second appellant from the position of liquidator of the company was warranted; and (ii) the second appellant had failed to perform his duties as a liquidator with promptitude and had delayed in liquidating the company. The issues that arose in this appeal were: (i) whether the removal of the second appellant as liquidator on the ground that he had no valid license was justified or warranted; (ii) whether the first respondent's application to remove the liquidator must be supported by all the contributories and creditors; (iii) whether all the creditors were served with the notice of the application by the first respondent for the removal of the second appellant as liquidator; and (iv) whether the contention that the second appellant had not discharged his duties with sufficient promptitude had been made out.

Held (allowing appeal)
Per Alwi Abdul Wahab JCA delivering the judgment of the court:

(1) The second appellant's liquidator's license having been renewed and with its effective date of renewal being backdated to 23 February 2023, there was no doubt that the second appellant was clothed with the authority to act as the liquidator of the company. The removal of the second appellant solely on this ground was unjustified in the circumstances of the case. (paras 18 & 19)

(2) There is no requirement that each and every person who is interested in the liquidation must support the application for removal, for if this were so, then the liquidator who has unfairly preferred the interests of one creditor or contributories over those of the general body of creditors and contributories can never be removed. It sufficed if the court is of the view that it would be in the interest of those who are interested in the liquidation for the liquidator to be removed. When the court considers this question, it will assess the interests of the general body of creditors and contributories as a whole. Just because one or more of the creditors or contributories have not expressed support for the application for removal is no bar to the court to exercise the power under s. 482(b) of the Companies Act 2016 ('CA'). (paras 32 & 34)

(3) There was nothing in the record of appeal to show that all other contributories or creditors had been given notice of the application for the removal of the second appellant. The only response from the first respondent was simply that this was a family company. None of the averments in the relevant affidavits were of any assistance as the court was unable to discern any suggestion that all the contributories, let alone

creditors had been informed of the application. Thus, the requirement for prior notice had not been fulfilled by the first respondent which was fatal in the application to remove a liquidator. (paras 36 & 39)

(4a) The findings of the JC that the liquidator failed to act within a reasonable time frame upon receiving the statement of affairs and delayed nearly a year before filing the discovery application, was inconsistent with the contemporaneous documents produced before the court. The liquidator had requested for the statement of affairs of the company on 2 February 2021 almost a month after his appointment as liquidator by the court. Although the statement of affairs was sent to the liquidator *vide* the company's secretary's letter dated 18 November 2021, such statement lacked particular details as explained in the liquidator's letter dated 29 November 2021. It took over nine months for the statement of affairs to be provided to the liquidator after the initial request. (paras 41-43)

(4b) Upon receiving the statement, the creditor was notified that additional information was required. However, despite multiple reminders, there was no response from the creditor. Without the cooperation of the contributories, the affairs of the company could not be ascertained as a whole before payment could be made to the creditors including the outstanding sum unpaid to LHDN. Eventually, the liquidator submitted a complaint letter to the Insolvency Department, requesting for action to be taken against the uncooperative creditor. Upon the advice of the insolvency, the liquidator finally filed the originating summons for discovery. The JC's findings that the second appellant failed to discharge his duties with sufficient promptitude was plainly wrong when measured against the compelling documents presented before this court. There was thus merit in the appellants' appeal warranting the appellate intervention in the present circumstances. (paras 43-48)

Case(s) referred to:

In Re Adam Eyton Ltd (1887) 36 Ch Div 299 ***(refd)***

Jagdis Singh Banta Singh & Anor v. Return 2 Green Sdn Bhd [2021] 3 CLJ 355 CA ***(refd)***

James Dominic Culaz v. Chong Chuan Long & Ors [2021] CLJU 2378; [2021] 1 LNS 2378 HC ***(refd)***

Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners) [2006] 3 CLJ 360 HC ***(refd)***

Re Edennote Ltd; Tottenham Hotspur Plc And Others v. Ryman And Another [1995] 2 BCLC 248 ***(refd)***

Re Keypak Homecare Ltd [1987] BCLC 409 ***(refd)***

Wong Sin Fan & Ors v. Ng Peak Yam & Anor [2013] 3 CLJ 17 FC ***(refd)***

Legislation referred to:
Insolvency Act 1986 [UK], ss. 108(2), 172(1)

For the appellants - Brenda Rangithan; M/s Mohanadass Partnership
For the 1st respondent - G Ravi & Aida Hassan; M/s Aida & G Ravi; (Also mentioning on behalf of the 2nd respondent, Malaysian Department of Insolvency Johor Bharu)

[Editor's note: For the High Court judgment, please see N Thanavathy Rajah v. Majidee Park Auto Spares & Services Sdn Bhd & Ors [2024] CLJU 1267 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Alwi Abdul Wahab JCA:

Introduction

[1] This appeal concerns the decision of Johor Bahru High Court given on 26 June 2023 in allowing the first respondent's application to remove the second appellant as a liquidator of the first appellant.

[2] We heard the appeal on 17 October 2024 and thereafter adjourned our decision to deliberate on the arguments advanced by the parties.

[3] Having done so, we hereby give our decision below including the grounds thereof.

Background Facts

[4] The second appellant, Jayapalasingam a/l Kandiah was appointed as the liquidator of the first appellant, Majidee Park Auto Spares & Services Sdn Bhd ('the company') pursuant to the winding-up order granted on 1 February 2021.

[5] The first and second appellants shall be collectively referred to herein as "the appellants" unless specified otherwise.

[6] The first respondent, N Thanavathy a/p Rajah was one of the directors of the company. The other directors are Punithavathy a/p N Rajah and Somas Kanda Rajah.

[7] As a result of the removal of the second appellant as the liquidator of the company, the High Court appointed the Director General of Insolvency (the second respondent) as the official receiver.

The High Court's Decision

[8] In allowing the first respondent's application, the learned Judicial Commissioner ('JC') held as follows:

> [28] It is clear from the provision above, the second Respondent has been disqualified to be appointed as liquidator once his licence has not been renewed. The second Respondent did not offer any explanation for the

failure to renew his license and did not apply for leave of the Court for him to continue to act as the liquidator for the first Respondent as provided in subsection 433(1) of Act 777.

[29] This ground alone will warrant the removal of the second Respondent without having a need to consider the merits of this application. Therefore, I am of the view that the second Respondent is no longer able to act as the liquidator of the first Respondent pursuant to paragraph 433(1)(a) of Act 777. Thus, the second Respondent must be removed as the liquidator of the first Respondent and be replaced by DGI pursuant to paragraph 477(1)(e) of Act 777. The contention of the second Respondent that there is no liquidator to be removed is devoid of merits as second Respondent is appointed pursuant to the Court order dated 1 February 2021 and thus, it needs to be removed by the order of the Court.

...

[35] The second Respondent then filed the Pre-Action Discovery application on 16.12.2022 in suit JA-24NCC-37-12/2022 against Punithavathy. I find that this application was filed after the Applicant's application (Enclosure 33) for an order for the second Respondent to prepare and make payment of the outstanding sum to the LHDN, being dismissed by the Court on 13.9.2022. The second Respondent has taken approximately 1 year from the date of received SOA, to file the application. I find that the second Respondent did not act within a reasonable period of time despite the second Respondent's claim that the directors have delayed in providing the information requested.

[36] It is pertinent to note that the reason for the appointment of a liquidator is to speed up the liquidation process, to realize the assets of the company and to pay off the creditors and other dues before finally putting the company in dissolution within the reasonable time. The liquidator will be paid remuneration or salary pursuant to section 479 of Act 777. Therefore, the liquidator is expected to discharge their statutory duties by exercising a high standard of care, skill, diligence and competence commensurate with their professional standards.

[37] The general duties of a liquidator appointed in a compulsory winding-up was explained by Marks J in the Australian case of *Corporate Affairs v. Harvey* [1980] VR 669 in the following terms:

> The duties of a liquidator need to be clearly understood. *Fundamentally, he must administer the estate strictly in accordance with the duties and obligations specifically imposed on him by the Companies Act and its Rules*. It is obvious that everything to be done in a competent administration is not and cannot be specifically prescribed. *Preserving the assets, giving proper attention to the administration, acting with due dispatch and ensuring adequate knowledge and understanding of the affairs of the companies are matters of common sense. If there is a difficulty at any stage of the administration then it is the clear duty of the liquidator to inform the Court and take direction*s ... .
>
> (emphasis added)

[38] Applying the principles stated in the above case, the second Respondent is found to not have acted with promptitude to file an application under subsection 487(3) of Act 777 to seek direction of the Court regarding the delay in getting the information from the directors of the first Respondent.

[39] Hence, I find that the second Respondent has unreasonably delayed his duties where he must transact or dispose of the liquidation process promptly or expeditiously or as soon as practicable.

[40] In this regard, I refer to the case of *Re Keypak Homecare Ltd* [1987] BCLC 409 where the liquidator was removed by the Court when he had failed to display sufficient vigour in carrying out his duties as liquidator, and in particular, although he had been in office for 3 months he had failed to conduct a thorough investigation of the company's affairs.

...

[52] I find that the second Respondent failed to perform his duties with promptitude and to settle the list of the contributors and the assets of the first Respondent within a reasonable period of time. Had the Applicant not discover that there was an outstanding sum unpaid to LHDN, the second Respondent may have not taken any steps to file the Pre-Discovery application, instead simply lamenting that he does not have enough documents to proceed further with the liquidation of the company.

[Note: The Applicant in the High Court is the first respondent in the present appeal while the second respondent in the High Court is the second appellant in the present appeal].

[9] Upon perusing the above High Court's decision, it becomes apparent that the first respondent's application for the removal of the second appellant as liquidator is primarily based on two main grounds:

(i) the High Court found that because the second appellant's liquidator's licence had not been renewed, the removal of the second appellant from the position of liquidator of the company was warranted; and

(ii) the High Court found that the second appellant had failed to perform his duties as a liquidator with promptitude and had delayed in liquidating the company.

The Present Appeal

The First Respondent's Preliminary Objection

[10] Learned counsel for the first respondent has raised two preliminary objections ('PO') in their submissions in respect of this appeal by the appellants namely:

(i) that the second appellant requires leave from the Court to Appeal to proceed with this appeal considering that the second appellant had been removed as a liquidator pursuant to the decision of the High Court; and

(ii) that the appellants' appeal was incompetent because the cause papers had not been served on the second respondent, the Director General of Insolvency.

[11] In reply to the PO raised by the first respondent, learned counsel for the appellants submitted that the leave was not required as the second appellant has the right to appeal against the order removing him as the liquidator. With regard to the service of the cause papers to the second respondent, the Director General of Insolvency, the appellants submitted that they had done so and it was clear that the second respondent had instructed the first respondent to mention on their behalf as they are not taking side and leaving the matter entirely to the court.

[12] In response, and without arguing any further, learned counsel for the first respondent informed this court that they would not be pursuing their PO and requested to proceed solely on the merits.

[13] Since first respondent had abandoned their PO, there were no remaining live issues to address in that regard although aspects of it were reflected in the parties' submissions. We shall now proceed to consider the merits of the appeal.

The Appellants' Grounds Of Appeal

[14] In the appeal before us, learned counsel for the appellants raised the following substantive grounds of appeal:

(i) whether the removal of the second appellant as liquidator on the ground that he had no valid license is justified or warranted;

(ii) whether the first respondent's application to remove the liquidator must be supported by all the contributories and creditors;

(iii) whether all the creditors were served with the notice of the application by the first respondent for the removal of the second appellant as liquidator; and

(iv) whether the contention that the second appellant had not discharged his duties with sufficient promptitude had been made out.

[15] We will address each of these grounds in turn as outlined below:

Whether The Removal Of The Second Appellant As Liquidator On The Ground That He Had No Valid License Is Justified Or Warranted

[16] At the hearing of the first respondent's application for removal of the second appellant on 23 June 2023, the High Court was informed by the second appellant that his licence as the liquidator could not be renewed. The second appellant was not able to explain why his licence could not be renewed because the second appellant was only informed of the non-renewal of his licence just before the hearing of the matter and there was no official reason then as to why his license was not renewed.

[17] On 2 October 2023, which was after the hearing of the first respondent's application, the second appellant entered into a consent judgment in respect of a judicial review application commenced against the decision of the Department of Insolvency for not renewing the second appellant's liquidator's licence, to be quashed and for the licence to be deemed to have been renewed as of 23 February 2023. The second appellant had applied to the Court of Appeal for the consent order dated 2 October 2023 to be adduced as fresh evidence in this present appeal. The application was allowed on 8 November 2023 on the basis that it was unopposed.

[18] In our judgment, with the second appellant's liquidator's licence having been renewed and with its effective date of renewal being backdated to 23 February 2023, there is no doubt that the second appellant was clothed with the authority to act as the liquidator of the company.

[19] As such, we find that the removal of the second appellant solely on this ground was unjustified in the circumstances of this case.

Whether The First Respondent's Application To Remove The Liquidator Must Be Supported By All The Contributories And Creditors

[20] Learned counsel for the second appellant cited the Federal Court's case of *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2013] 3 CLJ 17; [2013] 2 MLJ 629 in support of the proposition that, in an application to remove a liquidator, all the other creditors and contributories must support the application.

[21] In that case, the Federal Court held as follows:

> [23] The appellants' application vides encl 368 is based on s. 232(1) of the Act which provides that a liquidator appointed by the court may on cause shown be removed by the court. The principles of law governing an application to remove a provisional liquidator (or liquidator) are well set out as in the case of *Ng Yok Gee & Anor v. CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors, Interveners)* [2006] 7 MLJ 28 and include the following:
>
> (a) the court does not have an unfettered discretion, as cause must be shown before a liquidator can be removed. The position is not the same as it is when a liquidator is first appointed and the court may choose between two or more competing candidates;
>
> (b) the normal grounds for removal are that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict; and
>
> (c) the removal of the liquidator must be in the interest of all those who are interested in the company being liquidated. Thus, all the contributories and creditors of the company being liquidated must support such application to remove the liquidator.

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> [24] Based on the above principles of law, we are of the view that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator (see the case of *Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor* [2007] 2 MLJ 12).

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[22] Learned counsel for the second appellant relied on para. [23] (c) of the excerpt reproduced above as decided by the Federal Court in *Wong Sin Fan* (*supra*) which states "... Thus, all the contributories and creditors of the company being liquidated must support such application to remove the liquidator" to support her contention that the High Court was wrong in allowing the first respondent's application since there were no affidavits being affirmed by all the other creditors and contributories of the company to support the application.

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[23] Learned counsel for the second appellant also cited the case of *Jagdis Singh Banta Singh & Anor v. Return 2 Green Sdn Bhd* [2021] 3 CLJ 355; [2020] 2 MLJU 2193, in which the Court of Appeal had referred to the Federal Court's decision in *Wong Sin Fan* (*supra*). In so doing, learned counsel referred this court to para. 12 of the judgment of the Court of Appeal in *Jagdis Singh Banta Singh* (*supra*), where the Court of Appeal had quoted the same paragraph as reproduced above, *ie*, all the contributories and creditors must support an application to remove the liquidator to lay credence to their argument that all other creditors and contributories must support in the application to remove a liquidator.

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[24] We regret that learned counsel had failed to draw our attention to the paragraphs that followed, which not only were not in support of the position that she had advanced but were also quite contrary to it.

[25] For completeness and clarity, we reproduce paras. 11 to 14 of the Court of Appeal's grounds of judgment in *Jagdis Singh Banta Singh* (*supra*) which held as follows with emphasis added by us:

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> [11] As we said earlier, the learned High Court Judge dismissed the application of the appellants on the sole ground that they failed to obtain the support of all the creditors. His Lordship came to this conclusion upon being referred by counsel for the liquidator to the Federal Court case of *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2013] 3 CLJ 17; [2013] 2 MLJ 629. In that case, Zulkefli Makinudin CJ (Malaya) in considering the principles that govern the removal of a liquidator cited with approval the judgment of the High Court in the case *Ng Yok Gee & Anor v. CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors, Interveners)* [2006] 3 CLJ 360; [2006] 7 MLJ 28 and said as follows:

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(a) The court does not have an unfettered discretion, as cause must be shown before a liquidator can be removed. The position is not the same as it is when a liquidator is first appointed and the court may choose between two or more competing candidates.

(b) The normal grounds for removal are that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict.

(c) The removal of the liquidator must be in the interest of all those who are interested in the company being liquidated. Thus, all the contributories and creditors of the company being liquidated must support such application to remove the liquidator.

[12] Counsel for the liquidator latched on to the last sentence in para. (c) above and canvassed the novel argument that "all contributories and creditors" must support an application to remove a liquidator. The learned High Court Judge accepted the said argument for the reason that a statement to that effect was found in the judgment of the apex court. His Lordship held that the "condition" of obtaining the support of all the creditors was not satisfied in the instant case by the appellants. With respect, we are of the unanimous opinion that the High Court Judge erred in imposing the said condition on the appellants. Our reasons are as follows.

[13] Section 482(b) of the Companies Act 2016 or its predecessor provisions in the Companies Act 1965 do not impose the condition in question. The only condition stipulated in these provisions was that a liquidator may be removed on "cause shown". The fact that this was the sole condition in s. 232(1) of the Companies Act 1965 was highlighted in Kao Che Jen v. N Chanthiran Nagappan (supra) by Idrus Harun JCA in the passage that we quoted earlier. In fact, the relevant passage in Ng Yok Gee & Anor v. CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors, Interveners) (supra) which was summarised and restated in Wong Sin Fan & Ors v. Ng Peak Yam & Anor (supra) does not mention the condition that all creditors or contributories must support the application. It only states that all creditors must be notified of the application and that the removal of the liquidator must be for the benefit of all creditors.

[14] We also note that whether the support of all creditors is a mandatory condition for removal of the liquidator was not an issue that arose for determination in Wong Sin Fan & Ors v. Ng Peak Yam & Anor (supra). The issue in the said case was whether r. 173 of the Companies (Winding-up) Rules 1972 only applied in respect of services rendered in the course of assisting the liquidator in the ordinary administrative and management duties of the liquidators. It was held that the service of an advocate in the oppression suit did not fall under it. Thus, the statement in Wong Sin Fan & Ors v. Ng Peak Yam & Anor (supra) that the support of all creditors is a requirement in an application to remove a liquidator is a passing statement or an obiter dictum. We are mindful that some obiters, especially one from the apex court, are highly persuasive and are entitled to greater weight though not binding. In our respectful view, the condition that all creditors and contributories must support an application for removal of a liquidator would make it difficult to honour the principle that a liquidator must act fairly and impartially in administering the liquidation. This is because, in cases where the complaint is that the liquidator had

A *given preference to one set of creditors over others, it is unlikely that all creditors would be on common ground in respect of the application to remove the liquidator. Furthermore, in cases involving liquidation of public companies, as submitted by counsel for the appellants there could be thousands of creditors and contributories and thus it would not be practical to obtain consent from each one of them for the purpose of the application to remove the liquidator.*

B (emphasis added)

[26] It may well be observed that the question of law posed to the Federal Court in *Wong Sin Fan* (*supra*) had nothing to do with the question of whether all other contributories and creditors of the company being liquidated must support the application to remove the liquidator. Instead, the question of law
C posed in that case was as follows:

> Does r. 173 of the Companies (Winding Up) Rules 1972 ('the Rules') prohibit payment of all the solicitors bills paid by the respondents from the assets of Folin and Brothers Sdn Bhd (in liquidation) to their solicitors, unless the said solicitors bills have been considered and allowed by the
D taxing officer

[27] It is also clear that the passage relied upon both by the appellants in *Jagdis Singh Banta Singh* (*supra*) and the second appellant before us did not form any part of the *ratio decidendi* of the Federal Court's decision in *Wong Sin Fan* (*supra*) and thus, does not operate to bind the Court of Appeal.

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[28] It would be instructive at this stage to refer to the case of *Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners)* [2006] 3 CLJ 360; [2006] 7 MLJ 28. In that case, a contributory of a company, who was also the sole shareholder of a creditor to the company,
F sought to remove its liquidator. The High Court held in that case as follows:

> [41] *As a matter of law, it is not a sufficient ground for removal of a liquidator that a substantial minority or even the majority of shareholders wants the liquidators to be removed. It is not a popularity contest*.
>
> [42] *The court must be satisfied that it is against the interest of all those who are*
G *interested in the company being liquidated* that the liquidator should remain/ be removed (see *In Re Adam Eyton Limited; Ex parte Charlesworth* [1887] 36 Ch Div 299 and *In Re George Bond & Co. Ltd.* [1932] SR NSW 301).
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> [43] This point emerges in the passages quoted from *Chi Liung Holdings Sdn. Bhd. v. Soon Seng Kok* [1996] 3 CLJ 86 as follows:
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> H That the Court may remove a liquidator appointed by a company even without there being any misconduct alleged against him, if it appeared on the whole that it was for the benefit of the company in liquidation that he should be removed.
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> It was further held:
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> I *If the Court in satisfied on the evidence before it that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated*; that a particular mean should be made a

liquidator, then the Court has the power to remove the present liquidator and of course then to appoint some other person in his place.

... the due cause is to be measured by reference to the real, substantial, honest interest of the liquidation and to the purpose for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation.

... that in order to effect the removal of the liquidator the Court needs only to be satisfied that it is for the general advantage of those interested in the assets of the company that the liquidator be removed ....

(emphasis added)

[29] The High Court then went on to summarise the applicable principles in the following manner:

[50] For convenience, the court sets out below the relevant legal principles applicable to an application to remove a liquidator:

(a) A liquidator appointed by the court can only be removed by the court "on cause shown". Section 232 of Companies Act 1965.

(b) The court does not have an unfettered discretion as "cause must be shown". The position is not the same as it is when a liquidator is first appointed and the court may choose between two or more competing candidates.

(c) The normal ground for removal is that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict. See:

(i) *In re Sir John Moore Gold Mining* [1879] 12 Ch. Div 325, 331;

(ii) *Advance Housing v. Newcastle Classic Developments* [1994] 12 ACLC 701; and

(iii) *Commonwealth of Australia v. O'Reilly* [1984] 52 ALR 031.

(d) As to what constitutes a conflict of interest, there has to be a real and not merely theoretical possibility of conflict before a liquidator can be removed (*Advanced Housing* (*supra*)).

(e) A liquidator may act even though there has been a prior involvement with the company, provided that the involvement is unlikely to impede the liquidator from acting impartially (*Advanced Housing* (*supra*)).

(f) In *Advanced Housing* (*supra*) there was an actual conflict because the liquidator had to adjudicate on whether payments made to his firm immediately before the company went into liquidation constituted an unfair preference.

(g) It is an integral part of a liquidator's duty to investigate the affairs of the company from its foundation onwards. (*Commonwealth of Australia v. O'Reilly* (*supra*)).

(h) A liquidator who fails to investigate the affairs of the company to the prejudice of an applicant is in neglect of his duty and can be removed (see *In re Sir John Moore Gold Mining Company* (*supra*)).

(i) It cannot be a ground for removal that a liquidator is carrying out his duty to investigate the affairs of the company, even though some interested parties may object.

(j) In a case where the application for removal is by a creditor, all the creditors must be given notice of the application or it must be shown conclusively that the removal is for the benefit of all creditors (see *In re White Cliffs Dredging Co.* [1893] 11 NZLR 711).

(k) A liquidator is not bound to pursue a claim on behalf of the company, unless he believes that it has a reasonable prospect of success (see *In re George A Bond and Company Ltd* [1932] SR (NSW) 301).

(l) Where there are no assets which can be imperilled by the continuance in office, fair play to the liquidator may be the decisive factor (*In re George Bond* (*supra*)).

(m) Fair play to the liquidator is not to be left out of sight. (*Chuan Boon Chin v. JM McCormack & Ors* [1979] 2 MLJ 156 at 158).

(n) In *Adam Eyton Limited; Exparte Charlesworth* [1887] 36 Ch. 299, the applicant for removal of liquidator was required to give an undertaking to pay all costs and expenses of the liquidator on solicitor and client basis.

[30] The High Court in both *Ng Yok Gee* (*supra*) and *Chi Liung Holdings Sdn Bhd* (*supra*) referred to the English Court of Appeal's case of *In Re Adam Eyton Ltd* (1887) 36 Ch Div 299. In that case, it was held:

> ... It is not necessary, in order to justify the Court under this section in removing the liquidator, that there should be anything against the individual. In my opinion, although of course unfitness discovered in a particular person would be a ground for removing him, yet the power of removal is not confined to that, and I do not think that the late Master of the Rolls in the case of *In re Sir John Moore Gold Mining Company (1)*, which has been cited, intended to give an exhaustive definition. In fact he points out that, and what he says is this: "I should say that, as a general rule they point to some unfitness of the person – it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up – some unfitness in a wide sense of the term." He does not intend to exhaust all the grounds, but, in my opinion, and I believe the rest of the Court agree with me, *if the Court is satisfied on the evidence before them that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that*

> *a particular person should be made liquidator*, then the Court has power to remove the present liquidator, and of course then to appoint some other person in his place.
>
> (emphasis added)

[31] The words "all those who are interested in the company being liquidated" appearing in the passage quoted above appear to have been understood to mean that for the removal of the liquidator, it is a prerequisite that all creditors and contributories of the company must support such an application. In our considered view, this is an incorrect interpretation. What the passage intended to state is that the courts have the power to remove a liquidator if it considers that it is in the interests of the general body of creditors and contributories to do.

[32] There is no requirement that each and every person who is interested in the liquidation must support the application for removal, for if this were so, then the liquidator who has unfairly preferred the interests of one creditor or contributories over those of the general body of creditors and contributories can never be removed.

[33] In support for our interpretation of the reading of the passage *In re Adam Eyton Ltd* (*supra*) can be found in the English High Court's decision of *Re Edennote Ltd; Tottenham Hotspur Plc And Others v. Ryman And Another* [1995] 2 BCLC 248. In that case, Vinelott J was considering the removal of a liquidator under s. 172(1) of the Insolvency Act 1986, where the words "on cause shown" do not appear. He held that the difference in the language of that provision with s. 108(2) (which does contain the words "on cause shown") was immaterial. Vinelott J referred to the earlier decision of Millet J in the removal of a liquidator in *Re Keypak Homecare Ltd* [1987] BCLC 409 where he stated:

> Mr Neuberger and Mr Rayner James pointed out that in that case Millett J was influenced by general considerations of policy, the need not to be seen to countenance the continuation of practices which the 1986 Act was designed to prevent. However, his decision is founded on and usefully illustrates the general principle that a liquidator must act in the interests of the general body of creditors and should not continue in office if in the circumstances the creditors no longer have confidence in his ability to realise the assets of the company to their best advantage and to pursue claims with due diligence.

[34] To reiterate, learned counsel for the second appellant's proposition that all the other creditors and contributories must support the application to remove a liquidator is misconceived. Instead, the removal of the liquidator must be in the interest of all those who are interested in the company being liquidated.

[35] Based on our analysis of the above cases, the legal principles relevant to an application to remove a liquidator may be summarised in the following manner:

(i) there is no requirement for the application to remove a liquidator of company to be supported by all the creditors and contributories of the company;

(ii) it suffices if the court is of the view that it would be in the interest of those who are interested in the liquidation for the liquidator to be removed. When the court considers this question, it will assess the interests of the general body of creditors and contributories as a whole. Just because one or more of the creditors or contributories have not expressed support for the application for removal is no bar to the court to exercise the power under s. 482(b) of the Companies Act 2016;

(iii) in a case where the application for removal is by a creditor, all the creditors must be given the notice of the application: *In Re White Cliffs Dredging Co* (*supra*); and

(iv) in a case where the application for removal is made by a contributory, the contributory may either join all other contributories and creditors in the application or give notice of the application to all such contributories and creditors. This is on the basis that the creditors' claims take priority over those of the contributories, and hence, would have a material interest in the outcome of the application.

Whether All The Creditors Were Served With Notice Of The Application By The First Respondent For The Removal Of The Second Appellant As Liquidator

[36] On the facts of the present case, there is nothing in the record of appeal to show that all other contributories or creditors have been given notice of the application for the removal of the second appellant. The only response from the counsel for the first respondent was simply that this was a family company. He pointed the court to passages in the relevant affidavits. None of these averments were of any assistance as the court was unable to discern any suggestion that all the contributories let alone creditors had been informed of the application.

[37] In the High Court case of *James Dominic Culaz v. Chong Chuan Long & Ors* [2021] CLJU 2378; [2021] 1 LNS 2378, the learned judge upheld the preliminary objections raised by the liquidator on three-key procedural grounds particularly on the issue of failure to serve the application on all creditors and contributories.

[38] The learned judge referred and followed the position in *Ng Yok Gee* (*supra*) which relied on the English case of *In Re White Cliffs Dredging Co* (*supra*), stating that all creditors must be given notice of the application when the removal of a liquidator is sought.

[39] We were thus constrained to conclude that the requirement for prior notice has not been fulfilled by the first respondent which is fatal in the application to remove a liquidator.

Whether The Contention That The Second Appellant Had Not Discharged His Duties With Sufficient Promptitude Had Been Made Out

[40] For this final issue, it is essential to consider the timeline of measures undertaken by the liquidator in overseeing the liquidation process of the company which are as follows:

(i) immediately upon the appointment of the liquidator, letters were sent to all directors of the first appellant for the submission of the statement of affairs and information regarding the assets, liabilities and accounts of the company (see letters dated 2 March 2021 written by the liquidator to all the three directors of the company namely Punithavathy a/p N Rajah, Thanavathy a/p N Rajah and Somas Kanda Rajah, a letter dated 2 March 2021 was also sent to the company's secretary asking for a list of other documents;

(ii) on 18 November 2021, the company's secretary replied to the second appellant forwarding the liquidator with the statement of affairs together with the affidavit of Punithavathy a/p N Rajah verifying the statement of affairs;

(iii) on 29 November 2021, the second appellant wrote to Punithavathy a/p N Rajah to provide him with the following documents:

(a) the name and contact details of the debtors and creditors,

(b) the details of the whereabouts of the company's assets, and;

(c) the details of fixed deposit certificates and statements as well as the handing over of the fixed deposit certificates.

(iv) on the same day, *ie*, 29 November 2021, the second appellant again wrote to Punithavathy a/p N Rajah to provide him with the documents which he requested in the previous letter dated 2 March 2021. This letter serves as a second reminder;

(v) on 28 January 2022, an email was sent to Punithavathy a/p N Rajah informing her of the several reminders as per the letters attached to the email dated 28 January 2022 concerning the documents as requested in the letter dated 29 November 2021. The letters serve as a final reminder;

(vi) an email to Punithavathy a/p N Rajah on 17 February 2022 for an update on the requested documents as per the letter dated 28 January 2022;

(vii) by an email dated 18 February 2022, Punithavathy a/p N Rajah replied and informed that the documents and books as requested were at the store room which was currently rented. She also stated that any further queries on the matter are to be addressed to the company's secretary Mr Wong;

(viii) on the same day on 18 February 2022, another email was sent to Punithavathy a/p N Rajah asking her for further clarification on her previous email dated 26 November 2021 regarding the total current outstanding amount due, location and the complete address of the store room, lists of the documents and books in the store, current photo of the store and the documents inside the premises, who holds the key and from whom the keys to be collected;

(ix) on 28 February 2022, again another email was sent to Punithavathy a/p N Rajah regarding the status and information requested in the earlier email dated 18 February 2022;

(x) on 16 March 2022, an email was sent to Punithavathy a/p N Rajah referring her to several emails sent earlier requesting for information which were not received;

(xi) on 14 November 2022, the liquidator wrote to the Insolvency Department, notifying them that the statement of affairs provided by Punithavathy a/p N Rajah lacked essential details regarding the company's debtors and creditors, hindering any meaningful recovery efforts. This was despite repeated reminders to the company's directors. In the same letter, the liquidator expressed no objection to the department taking necessary action against this director. Regarding another director, Somas Kanda Rajah, the liquidator noted that obtaining the statement of affairs from him was not possible, as he had been denied access to the company's records and books of account; and

(xii) on 16 December 2022, the liquidator filed the pre-action discovery *vide* Originating Summons No. JA-24NCC-37-12/2022 against Punithavathy a/p N Rajah requesting for several documents relating to the company in liquidation to be provided for the purpose of this action.

[41] Based on the chronology derived from the series of emails and letters as mentioned above, we find that the findings of the learned JC that the liquidator failed to act within a reasonable timeframe upon receiving the statement of affairs and delayed nearly a year before filing the discovery application was inconsistent with the contemporaneous documents produced before the court.

[42] The liquidator had requested for the statement of affairs of the company on 2 March 2021 almost a month after his appointment as liquidator by the court. Although the statement of affairs was sent to the liquidator *vide* the company's secretary's letter dated 18 November 2021, such statement lacked particular details as explained in the liquidator's letter dated 29 November 2021.

[43] It is worth noting that it took over nine months for the statement of affairs to be provided to the liquidator after the initial request. Upon receiving the statement, the creditor was notified that additional information was required. However, despite multiple reminders sent via letters and emails dated 29 November 2021, 28 January 2022, 17 February 2022, 18 February 2022, 28 February 2022 and 16 March 2022, there was no response from the creditor.

[44] Without the cooperation of the contributories, the affairs of the company cannot be ascertained as a whole before payment can be made to the creditors including the outstanding sum unpaid to LHDN. Although the balance sheet as at 31 July 2021 in the statement of affairs shows a sum of RM254,408.98 which refers to "directors' account", there are no supporting documents nor basis for this sum. Similarly, a sum of RM81,382 was attributed to "other creditors" but no information as to who these other creditors are is forthcoming.

[45] Eventually, the liquidator submitted a complaint letter dated 14 November 2022 to the Insolvency Department, requesting for the action to be taken against the uncooperative creditor.

[46] Upon the advice of the insolvency, the liquidator finally filed the originating summons for discovery on 16 December 2022.

[47] Upon our review, we find that the learned JC's findings that the second appellant had failed to discharge his duties with sufficient promptitude were plainly wrong when measured against the compelling contemporaneous documents presented before this court.

[48] Consequently, there is merit in the appellants' appeal warranting the appellate intervention in the present circumstances.

Conclusion

[49] For all the above reasons, we allow the appeal and set aside the order of the learned JC. We award cost of RM10,000 to the appellants subject to allocatur.